Thomas Mcclellan, d/b/a American Electric and International Brotherhood of Electrical Workers, Local 234, AFL-CIO. Case 32-CA-15619

April 10, 1998

DECISION AND ORDER

By Chairman Gould and Members Fox and Liebman

The main issues in this case¹ are whether the judge correctly found that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire union organizer Forrest Bayer and that its owner further violated Section 8(a)(1) by advising an employee that he would not hire anyone who had anything to do with the Union. The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,² findings,³ and conclusions,⁴ and to adopt the recommended Order as modified and set forth in full below.⁵

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Thomas McClellan, an individual, d/b/a American Electric, Santa Cruz, California, his officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Telling employees that it would not hire anyone who had anything to do with a union.
- (b) Discriminatorily refusing to hire applicants for employment because of their union affiliation and activities.
- (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Within 14 days from the date of this Order, offer Forrest Bayer employment to the job for which he applied or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, dismissing, if necessary, any employees hired to fill the position.
- (b) Make Forrest Bayer whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision, as modified in this decision.
- (c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire, and within 3 days thereafter notify Bayer in writing that this has been done and that the refusal to hire will not be used against him in any way.
- (d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.
- (e) Within 14 days after service by the Region, post at its place of business in Santa Cruz, California, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 15, 1996.

¹On April 8, 1997, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions. The Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

²The Respondent has excepted to the judge's failure to rule on a prehearing motion to dismiss the complaint. In light of the judge's unfair labor practice findings, which we affirm, the motion is denied.

³The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

⁴We do not adopt the judge's suggestion, in fn. 4 of his decision, that the Respondent's owner "was aware that the Union was attempting to set him up for unfair labor practices." Chairman Gould finds that it is not necessary to pass on the General Counsel's cross-exception to this finding.

⁵ In accord with the General Counsel's cross-exceptions and *Dean General Contractors*, 285 NLRB 513 (1987), we shall modify the remedy by adding a provision that the Respondent offer a job to discriminatee Forrest Bayer, notwithstanding the Respondent's completion of work at the jobsite where it discriminatorily refused to employ him. The Respondent will bear the burden of proving in compliance proceedings that it would not have transferred Bayer from project to project.

We shall further modify the recommended Order by including separate reinstatement, backpay, personnel record removal, records preservation, and notice requirements that accord with *Indian Hills Care Center*, 321 NLRB 144 (1996).

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT tell you that we will refuse to hire anyone who has anything to do with a union.

WE WILL NOT discriminate against employee applicants because of their union affiliation or activity by refusing to hire them.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, offer Forrest Bayer employment to the job for which he applied or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges to which he would have been entitled if he had been hired

WE WILL make Forrest Bayer whole for any loss of earnings and other benefits resulting from the discrimination against him, less any interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to hire Forrest Bayer, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discrimination will not be used against him in any way.

THOMAS McClellan d/b/a American Electric

Gary M. Connaughton, Esq., for the General Counsel. Robert Fried, Esq. (Thierman Law Firm), of San Francisco, California, for the Respondent. Eugene Miller, Esq. (The Hilby Professional Center), of Seaside, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice of hearing in this matter was held before me in Santa Cruz, California, on February 6, 1997. The original charge was filed on August 15, 1996, by the International Brotherhood of Electrical Workers, Local 234, AFL–CIO (the Union). On November 20, 1996, the Regional Director for Region 32 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging violations by Thomas McClellan, an individual d/b/a American Electric (the Respondent) of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent, in its answer and amended answer, duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel (the General Counsel) and counsel for the Respondent.

On the entire record, and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a sole proprietorship with an office and place of business located in Santa Cruz, California, where it is engaged in the construction industry as an electrical contractor. In the course and conduct of its business operations the Respondent annually sells and ships goods or provides services valued in excess of \$50,000 directly to customers or business enterprises that themselves meet (or would meet, but for their exempt status), one of the Board's jurisdictional standards, other than the indirect inflow or indirect outflow standards. It is admitted and I find that the Respondent is engaged in commerce or in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted and I find that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Issues

The principal issue raised by the pleadings is whether the Respondent has violated Section 8(a)(1) and (3) of the Act by stating to an employee that it would not hire certain union electricians, and by failing and refusing to hire Forest Bayer, an applicant for employment, because of his union affiliation as an organizer for the Union.

B. The Facts

Between the dates of July 16 and July 22, 1996,¹ the Respondent's owner, Thomas McClellan, placed an ad in the *Santa Cruz Sentinel*, a local newspaper, as follows: "Electrician, fax info to [telephone number]." On July 17, Forrest Bayer, an organizer for the Union, faxed his resume to the Respondent. On July 19, McClellan sent Bayer a letter telling him that all positions had been filled.

It is admitted that McClellan had had prior conversations with Bayer regarding the possibility of becoming a signatory contractor to the standard IBEW area contract, and that for several months McClellan had attempted to put Bayer off by telling him that due to the nature of his business he was not yet ready to enter into an agreement with the Union. On July 19, after receiving Bayer's resume, McClellan advised Bayer that, "Unfortunately, we have filled the positions that were open with our company. We will however keep your resume on file." At this time he knew that Bayer was a union organizer and business representative and that Bayer was interested in organizing his employees; he also acknowledged that, on reviewing the resume, Bayer appeared to be a very experienced and qualified electrician.

McClellan testified that at the time he placed the foregoing ad the Respondent was engaged as an electrical subcontractor on the campus of California State University at Monterey Bay (CSUMB), where three or four dormitory buildings were being constructed, and had just been advised that due to the nature of the project the work was being speeded up in order to get the buildings completed earlier than originally scheduled; thus, he would need a much larger employee complement than he currently employed. At the time the project began in May he had a total of about 12 journeyman and apprentice electricians, and in July his employee complement had increased to about 18 employees. In August, however, he had approximately 36 electricians working on this job. The job was completed about the last week in August.

McClellan testified that because of the "big push" in August he was trying to get almost anybody on a temporary basis, and "borrowed" many employees from other contractors for a day or two as they were available. However, following his rejection of Bayer on July 19, he also hired four journeymen electricians as "regular" employees for the remainder of the project. McClellan testified that as of the date he received Bayer's resume he had not yet contacted any of these four individuals. Explaining, McClellan testified that he had previously promised jobs to these people in May, after he had hired his original complement of employees, and told them that when work picked up he would hire them. Further, his purpose for putting the ad in the newspaper was not to obtain electricians for immediate employment, but was merely to build up a backlog of resumes to prepare himself for the possibility that he would need even more employees than anticipated after the four regular employees had commenced

It was stipulated that the following journeyman electricians were hired as "regular," that is, not temporary, employees, on the following dates: Anthony Miemotka, July 27; Larry Warren, August 1; Kyle Tuck, a former employee, August 5; and Christopher Neill, a former employee, August 17.

Regarding the hiring of Larry Warren, McClellan testified that he had a practice of hiring employees who were recommended to him by current employees, and in this regard Warren had previously been recommended to him by Deborah McGowan, a current apprentice. However, McGowan testified that although she knew Warren as a result of previously working on the same jobsite with him, she did not recommend Warren to McClellan as she "didn't want to be a part of [Warren] getting hired on" because she wasn't sure of his ability.

In addition to the foregoing reason for failing to hire Bayer, McClellan testified that on or about July 23,2 prior to the time any of the four regular employees began working at the site, Bayer came to the jobsite and, while McClellan and a group of his employees were eating lunch near the construction trailer, made a disparaging remark about the Respondent's apprentice electricians.

The account of this incident given by both parties is essentially the same, however Bayer testified that the incident took place on August 8. Thus, Bayer testified that on August 8, he entered the site with James Nichols, an organizer and president of the local union herein. Nichols went to another location on the site while Bayer approached McClellan and some of his employees who were eating lunch. At this time Bayer was aware that the Respondent was a contractor affiliated with the Associated Building Contractors (ABC), an organization of nonunion employers, and that McClellan obtained his apprentice electricians through the ABC apprenticeship training program. Bayer testified that his purpose for visiting the site was to just talk to McClellan as a result of having received the letter advising him that all positions had been filled. McClellan and abut four of his employees were eating lunch. Bayer said hello and asked, "Can you use any good people?" McClellan answered that the job was "pretty filled up right now." Bayer was acquainted with Deborah McGowan, an apprentice, as she had previously applied as an apprentice with the IBEW program. There was some conversation regarding the apprenticeship program, and at one point Bayer said something to the effect that "the ABC program sucks, and that the IBEW program is a much better program. And that if we were to organize American Electric, they would be slotted into the IBEW program."

McClellans's account of the conversation does not differ significantly from the account given by Bayer except, according to McClellan, Bayer was accompanied by Union Representative Nichols at the time, and the conversation occurred on July 23 rather than August 8. Bayer testified that he was surprised at Bayer's derogatory comment regarding the ABC apprenticeship program, which was made in a somewhat loud tone of voice, particularly as it was directed to ABC apprentices who were present. He told Bayer that they were having their lunchbreak and did not want to have a confrontation, and that he would appreciate it if Bayer and Nichols would leave. They did so.

¹ All dates or time periods herein are within 1996 unless otherwise stated

²In documents submitted during the investigatory stage of this proceeding the Respondent placed the date of Bayer's visit as the latter part of July, around July 19 or 20. At the hearing, McClellan placed the date as July 23, as this was about the time that two of his employees had notified him that tools had been stolen from their tool boxes. However, McClellan had no notes indicating the date of Bayer's visit.

When asked whether the foregoing statement by Bayer had anything to do with his not being hired, McClellan answered that ''it may have played a little bit, just the fact that if anybody else had come to me to apply for a job and they said those remarks, I can't see how they can get along with my employees after they said that right in front of them . . . I didn't have a place to put him by himself . . . I couldn't see him disrupting my work force.''³

According to Deborah McGowan, Bayer and Nichols came to the site where employees were eating lunch and Bayer was "kind of loud" and the whole thing seemed kind of funny to him. McGowan testified that as an ABC apprentice she "just felt insulted" on hearing Bayer's derogatory remarks. However, she did not say anything and never communicated her feelings to McClellan.

Union Representative Nichols testified that although he went to the site with Bayer, he was not present during the conversation as he was taking photos of other things at the site. The photos, identified on the record, bear an imprinted date of August 8, which is the date, according to Nichols, that he and Bayer visited the site.

Richard Zeman was employed by the Respondent as a journeyman electrician from May 7 to July 31. Zeman testified that during the latter part of July, McClellan mentioned that he had received a resume from Bayer and that the Union was pulling every trick in the book to get him to violate the law.⁴ He further said that he wouldn't hire any "stoolie" from the Union. Zeman said that he knew Bayer and that Bayer was a good electrician.⁶ McClellan just said that he would not hire anybody who had anything to do with the Union.

On July 31, the day Zeman gave the Respondent 2 weeks' notice that he would be quitting, he was dismissed by the Respondent. During the latter part of his employment Zeman

had been speaking to union representatives, and after leaving the Respondent's employ became a union member, cooperated with the Union in the investigation of this matter, and was referred to jobs through the union hiring hall.

McClellan denied that he told Zeman that he would not hire any union organizers, but did testify that he had a conversation with Zeman regarding the bogus resume from "McKnight" that was the same resume that he had received in May from Nichols, whom he hired. McClellan said that was all he remembered about the conversation with Zeman, and that it was his policy that he basically did not discuss business matters with his employees.

C. Analysis and Conclusions

The General Counsel has presented a prima facie case supporting the complaint allegation that the Respondent has failed and refused to hire Forrest Bayer, an applicant for employment, because of his union affiliation and activities in attempting to organize the Respondent's employees.

Thus, the record is clear that on July 19, the Respondent advised Bayer that all the positions for electrician had been filled. This was not the case, however, as McClellan admittedly had not even contacted any of the four regular employees who were not hired until well after Bayer, who was admittedly a well qualified applicant, was sent a rejection letter. While the Respondent contends that, in May, after the commencement of the CSUMB project, each of the four employees had been promised future employment at some indeterminate time, it does not follow that these employees would be available for work or would even desire such employment some 3 months later. Nor does it seem likely that the Respondent would turn down Bayer, an admittedly qualified applicant, before determining whether any of the four employees would be available.

Moreover, it is noteworthy that McClellan testified that he wanted to hire employee Warren based on the recommendation of a current employee, whereas the credible record evidence shows that Warren was not so recommended by that employee.

Regarding the testimony of Richard Zeman, a former employee, I have carefully considered his testimony in view of the fact that he was terminated on giving his 2 weeks' notice, and that he thereafter cooperated with and became a member of the Union. Nevertheless, Zeman was subjected to extensive cross-examination and I conclude that his testimony is credible. Thus, I find that shortly after receiving the resume from Bayer, and during the course of a conversation involving the receipt of Bayer's resume, McClellan did tell Zeman that he would not hire anybody who had anything to do with the Union. I do not credit McClellan, who categorically denied this statement. Accordingly, I find that this statement was coercive and is violative of Section 8(a)(1) of the Act, particularly in light of the fact that Zeman at the time was considering union membership. In addition, it further supports the complaint allegation that Bayer's application for employment was rejected for discriminatory reasons and not for the reasons advanced by the Respondent.

And finally, it is significant that the Respondent maintained, until the commencement of the instant hearing, that

³ Initially, during the investigation of this matter, the Respondent had submitted a position statement to the Board on October 3, stating that, "With respect to the reasons for not hiring the applicant, Forrest Bayer, the employer determined that Mr. Bayer would be an uncooperative employee, since he intentionally tried to instigate a conflict and a possible confrontation with our apprentices." The Respondent did not take the position that Bayer was not hired because all the positions had been filled until the hearing herein. Indeed Respondent's answer and amended answer to the complaint contains the affirmative defenses that Bayer had submitted a fraudulent application and that he "used fighting words which precluded him as an applicant to be hired. Also, said conduct angered the employer." Thus, there was no contention that Bayer was refused employment because the available positions had been filled. Current counsel did not represent the Respondent until sometime after the Respondent's answers to the complaint had been filed.

⁴On the same day that McClellan had received the resume from Bayer he also received a resume from another individual, purportedly "Fred McKnight." The resume, however, was the same resume submitted by Nichols, months earlier. In fact, McClellan had hired Nichols on the project and Nichols had worked for him for a while until he quit, at which time he advised McClellan that he was a union representative and organizer. Thus, during his discussion with Zeman, McClellan was aware that the Union was attempting to set him up for unfair labor practice charges.

⁵ While Zeman testified that the word "stoolie" may not have been used by McClellan, Zeman interpreted McClellans's remarks as conveying that connotation.

⁶Zeman testified that he had been a contractor some 15 years earlier and that Bayer had been employed by him at that time.

 $^{^{7}\}mbox{There}$ is no contention that Nichols' employment was other than satisfactory.

Bayer was not hired because of the alleged argumentative and disruptive statement he made to some of Respondent's apprentice electricians sometime in July or August. In this regard, I credit the testimony of Union Representatives Bayer and Nichols, who placed this event on August 8, well after Bayer was rejected for employment and other were hired. Thus, McClellan's testimony shows that he was merely speculating as to the date and had not otherwise definitively placed the date as being July 23, while the photo date stamp of Nichols, coupled with the credible testimony of Nichols and Bayer, support the date of August 8. Thus, it is clear, and I find, that Bayer's remarks could not have been a factor in his being rejected for employment.

Moreover, I find nothing in Bayer's remarks that would have disqualified him for future employment. Thus, Bayer advised some of the Respondent's employees that the ABC apprenticeship program "sucks." Placed in context, this remark was merely a somewhat forceful statement that in Bayer's opinion the ABC program was a poor substitute for the IBEW apprenticeship program, and that if the Respondent became signatory to the IBEW area agreement the employees could participate in the better IBEW program. While some of the apprentices may have taken exception to this remark and even may have been offended, as ABC apprentice Deborah McGowan so testified, nevertheless Bayer's remark seems to be no more than ordinary union campaign rhetoric to which unions, employees, and employers are often subjected during the course of competing claims for support. Accordingly, I find that Bayer's statement did not exceed the bounds of permissible organizing rhetoric, and that by such a remark he did not forfeit his right to future employment. Paid union organizers are employees within the meaning of the Act,8 they have a right and, in fact, an obligation to the union to organize, and it is to be expected that statements critical of one of two competing labor organizations should be reasonably understood merely as campaign propaganda and should be evaluated as such by employees. Nor has the Respondent cited any pertinent cases to the contrary.

On the basis of the foregoing I conclude that, as stated, the General Counsel has presented a prima facie case, and that the Respondent has not sustained its burden of proof under *Wright Line*⁹ by demonstrating by a preponderance of the evidence that it failed and refused to hire Forrest Bayer for legitimate and nondiscriminatory reasons. Accordingly, I find that the Respondent has violated Section 8(a)(3) of the Act as alleged.

CONCLUSIONS OF LAW

- 1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
- 3. The Respondent has violated Section 8(a)(1) of the Act by advising employees that it would not hire any employees who had anything to do with the Union.
- 4. The Respondent has violated Section 8(a)(3) of the Act by failing and refusing to hire Union Organizer Forrest Bayer.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁰

THE REMEDY

Having found that the Respondent has violated and is violating Section 8(a)(1) and (3) of the Act, I recommend that it be required to cease and desist therefrom and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. Moreover, as the project on which Bayer would have been employed has been completed, the Respondent shall be required to make him whole for any loss of wages and other benefits he may have suffered by reason of Respondent's discrimination against him in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Further, the Respondent shall be required to post an appropriate notice, attached heret as "Appendix."

[Recommended Order omitted from publication.]

⁸ NLRB v. Town & Country Electric, 116 S.Ct. 450 (1995).

⁹ 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

¹⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.